IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 603.

RAY CONSOLIDATED COPPER COMPANY,
PLAINTIFF IN ERROR,

vs.

DAN VEAZEY, DEFENDANT IN ERROR.

MOTION TO ADVANCE.

Comes now the plaintiff in error in the above-entitled cause, and moves that said cause be advanced and be heard immediately following No. 162, Arizona Copper Company *vs.* Bray, at this term of court.

This motion is made for the reason that the question at issue in the above-entitled cause is identi-

cally the same as that involved in No. 162, Arizona Copper Company *vs.* Bray, to wit, the validity under the 14th Amendment of the Constitution of the United States, of Chapter 6, Title XIV, of the Revised Statutes of Arizona, 1913, Civil Code, known as the Employers' Liability Law, as shown by the assignments of error in both of said cases.

Counsel believe that it is greatly in the interest of clearness and a proper consideration of the constitutionality of the statute in question, that these cases be argued at the same time, and that such action will save time and labor both to the court and to counsel.

Respectfully submitted,

ALEX. BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for Plaintiff in Error.

The defendant in error hereby acknowledges service of a copy of the within motion, and for the reasons stated therein, joins in urging its allowance.

F. C. STRUCKMEYER,
JOSEPH S. JENCKES,
Attorneys for Defendant in Error.

[Endorsed:] No. 603. October Term, 1917. In the Supreme Court of the United States. Ray Consolidated Copper Co., Plaintiff in Error, *vs.* Dan Veazey, Defendant in Error. Motion to Advance. Chalmers, Kent & Stahl, Attorneys and Counsellors at Law, 205-208 Fleming Block, Phœnix, Arizona.

Received copy of the within Brief of Plaintiff in Error this seventh day of November, 1917.

STRUCKMEYER & JENCKES
Attorneys for Defendant in Error

SUBJECT INDEX

CASES CITED

Supreme Court of the United States

OCTOBER TERM, 1917.

RAY CONSOLIDATED COPPER COMPANY,
Plaintiff in Error,
vs.
DAN VEAZEY,
Defendant in Error.

No. 603

STATEMENT OF THE CASE.

On the 20th day of October, A. D. 1916, the defendant in error, Dan Veazey, filed his complaint (T. R. p. 1) in the office of the Clerk of the District Court of the United States, in and for the District of Arizona, against the plaintiff in error, Ray Consolidated Copper Company, a corporation, alleging, in substance, that the plaintiff was a citizen of the State of Arizona, and that the defendant was a corporation organized and existing under and by virtue of the laws of the State of Maine; that on the 10th day of February, 1916, the said Veazey was employed by the Ray Consolidated Copper Company in and about a certain mill and reduction works as a millwright and carpenter in the construction of what was known as a "flotation system," and that on said day, while the said Veazey was exercising reasonable care for

his own safety, he suffered severe personal and bodily injuries by an accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, and that said injuries were sustained while the said Veazey was standing upon a certain timber or joist, engaged in bolting and fastening together the timbers of said flotation system, said timber or joist being elevated above the ground or floor a distance of approximately 10 feet; that while Veazey was so engaged in said employment, he slipped from said timber or joist and fell to the ground upon the floor of the mill, which floor was composed of concrete: that by reason of the force and violence with which plaintiff's body and limbs came in contact with the floor, he suffered severe personal and bodily injuries, and that plaintiff (defendant in error) had sustained damages by reason of said injuries in the sum of $10,000. Said complaint also alleges that said action is brought under and by virtue of the provisions of Chapter 6, Title 14, Revised Statutes of the State of Arizona, 1913, Civil Code, relating to the liability of employers for injuries to workmen in hazardous occupations.

Thereafter, and on the 17th day of November, 1916, the defendant (plaintiff in error), Ray Consolidated Copper Company, filed its demurrer and answer to the complaint of the plaintiff (defendant in error), Veazey (T. R. p. 3), demurring, first, upon the ground that said complaint did not state facts sufficient to constitute a cause of action; and, second, demurring upon the ground that recovery is therein sought under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled, "Liability of Employers for Injuries to Workmen in Dangerous Occupations," and that said Act is unconstitutional and void, and con-

trary to and in violation of the Fourteenth Amendment to the Constitution of the United States in that said Act is an attempt to deprive the defendant (plaintiff in error) of its property without due process of law and denies to the defendant (plaintiff in error) the equal protection of the laws.

The answer, in the event that the demurrer should be overruled, admits the allegations of said complaint with respect to the citizenship of the plaintiff (defendant in error) and of the defendant (plaintiff in error), and also with reference to the business in which the defendant (plaintiff in error), Ray Consolidated Copper Company was then engaged; admits that the defendant, Veazey (plaintiff in error) met with an accident; and denies every other allegation of said complaint which is not specifically admitted. As an affirmative defense, said answer alleges that, if plaintiff (defendant in error) was injured as in said complaint alleged, it was by reason of his own carelessness and negligence which directly and proximately contributed to said injury; and that, if plaintiff (defendant in error) was injured as in said complaint alleged, it was by reason of certain dangers, risks and hazards then and there present and which had theretofore been and were then and there by him assumed. The answer also alleges, as an affirmative defense, that such action is brought under and by virtue of Chapter 6, Title 14, of the Revised Statutes of Arizona, 1913, Civil Code, and that said Act is unconstitutional for the reason that it is an attempt to impose upon the defendant (plaintiff in error), Ray Consolidated Copper Company, liability for injuries that may have been sustained by plaintiff (defendant in error) without fault or negligence on the part of the defendant (plaintiff in error), and is an attempt to deprive the defendant (plaintiff in error) of

its property without due process of law, and that it denies to the defendant (plaintiff in error) the equal protection of the laws.

Thereafter, and on the 3rd day of March, 1917, plaintiff Veazey (defendant in error) filed his amended complaint (T. R. p. 5), and the defendant (plaintiff in error), Ray Consolidated Copper Company, thereupon, in open court, elected to stand upon the demurrer and answer to plaintiff's original complaint as demurrer and answer to plaintiff's amended complaint, and said demurrer to plaintiff's amended complaint was overruled, to which defendant (plaintiff in error) duly excepted (T. R. p. 7).

Thereafter, and on April 5, 1917, the cause came on regularly for trial (T. R. p. 7). A jury was duly empaneled and sworn and accepted by both sides. Whereupon, before the statement of plaintiff's case to the jury had been made, and prior to the introduction of evidence, counsel for defendant (plaintiff in error) made objection (T. R. p. 8) to any statement of the case to the jury and to the introduction of any evidence on behalf of the plaintiff (defendant in error), on the ground that this act under which the action is brought is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States and that it would deprive the defendant (plaintiff in error) of its property without due process of law and would deny to the defendant (plaintiff in error) the equal protection of the law.

The objection was overruled by the court, and the defendant (plaintiff in error) duly excepted thereto (T. R. p. 8). Witnesses were sworn and testified on behalf of both parties (T. R. pp. 8 & 9), and the evidence being closed, argument of counsel was had, and requests in writing for instructions to the jury were made to the court by both parties (T. R. pp. 9 & 11).

Whereupon the case was submitted to the jury; and having retired and deliberated, the jury returned into court a verdict in behalf of the plaintiff (defendant in error), and against the defendant (plaintiff in error), assesing plaintiff's damages at the sum of Three Thousand Dollars (T. R. p. 10).

On the trial of said cause, it was shown that the plaintiff, Veazey (defendant in error), sustained certain injuries by reason of a fall from certain timbers while the said Veazey was in the employ of the Ray Consolidated Copper Company, and that such accident occurred by reason of a condition or conditions of the occupation of said plaintiff (defendant in error), and said accident was not due to the negligence of said plaintiff (defendant in error), or to the negligence of the defendant (plaintiff in error).

SPECIFICATIONS OF ERROR.

I.

The Court erred in overruling the Demurrer of the defendant (plaintiff in error) to the Amended Complaint filed in this cause, as follows:

> "Demurs to said (Amended) Complaint upon the ground that same does not state facts sufficient to constitute a cause of action.
>
> "Demurs to said (Amended) Complaint upon the ground that recovery is therein sought under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: 'Liability of Employers for Injuries to Workmen in Dangerous Occupations," and that said Act is unconstitutional and void and contrary to and in violation of the 14th Amendment to the Constitution of the United States in that said Act is an attempt to deprive this defendant of its property without due

process of law and denies to this defendant the equal protection of the laws."

II.

The Court erred in overruling the first ground of Demurrer of the defendant (plaintiff in error) to the Amended Complain of plaintiff (defendant in error) filed in this cause, which said Demurrer is upon the ground that said Amended Complaint does not state facts sufficient to constitute a cause of action, and in holding that said Amended Complaint does state a cause of action.

This specification is urged for the reason that said Amended Complaint shows on its face that recovery is therein sought under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, entitled "An Act Providing for Liability of Employers for Injuries to Workmen in Dangerous Occupations,' which said Act is unconstitutional and in violation of the 14th Amendment to the Constitution of the United States in that the Act imposes an unlimited liability upon employers and upon this defendant (plaintiff in error) without any fault on the part of such employers and of this defendant (plaintiff in error) and that said Act would deprive this defendant (plaintiff in error) of its property without due process of law and would deny to it the equal protection of the laws.

III.

The Court erred in overruling the second ground of Demurrer of the defendant (plaintiff in error) to the Amended Complaint of the plaintiff (defendant in error) filed in this cause, as follows:

"Demurs to said (Amended) Complaint upon the ground that recovery is therein sought under and

by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: 'Liability of Employers for Injuries to Workmen in Dangerous Occupations,' and that said Act is unconstitutional and void and contrary to and in violation of the 14th Amendment to the Constitution of the United States in that said Act is an attempt to deprive this defendant of its property without due process of law, and denies to this defendant the equal protection of the laws."

This specification is urged for the reason that said Act is unconstitutional and void and contrary to and in violation of the 14th Amendment to the Constitution of the United States and would deprive this defendant (plaintiff in error) of its property without due process of law, and would deny to this defendant (plaintiff in error) the equal protection of the laws as fully set forth in said ground of Demurrer, in that it imposes upon employers and upon this defendant (plaintiff in error) herein unlimited liability for injuries sustained by employees without fault or negligence on the part of such employers and of this defendant (plaintiff in error).

IV.

The Court erred in not sustaining the objection of the defendant (plaintiff in error) to the making of any statement to the jury on behalf of the plaintiff (defendant in error) and to the introduction of any evidence on behalf of the plaintiff (defendant in error) which objection, in which is stated the grounds thereof, is as follows, to-wit:

"We object to any statement of the plaintiff or the introduction of any evidence in this case, on the ground that this action is brought under the pro-

visions of what is known as the Employers' Liability Act, which is Chapter 6, Title 14, of the Revised Statutes of Arizona, 1913, entitled 'An Act Providing for Liability of Employers for Injuries to Workmen in Dangerous Occupations,' on the ground that this Act under which the action is brought is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, in that the act imposes an unlimited liability upon employers and upon this defendant without any fault on its part and that theAct violates the Fourteenth Amendment to the Constitution of the United States and that it will deprive the defendant of its property without due process of law and would deny to the defendant the equal protection of the law, and that the Amended Complaint brought under this Act does not state facts sufficient to constitute a cause of action, for the reason that the Act under which the Amended Complaint is brought is unconstitutional."

V.

The Court erred in overruling and denying the motion and request of the defendant (plaintiff in error) to instruct the jury to return a verdict in favor of the defendant (plaintiff in error) and against the plaintiff (defendant in error) after the introduction of all testimony in the case, and upon the defendant (plaintiff in error) resting its case, which motion and request is as follows and made upon the grounds therein stated, to-wit:

"Comes now the defendant in the above entitled cause and hereby moves the Court to charge the jury as set forth in its request Nnmber 1 and bases its said motion to so charge as set forth in said re-

quest Number 1 upon the grounds set forth immediately following said request.

Number 1.

The jury is hereby instructed and directed to render a verdict in favor of the defendant and against the plaintiff herein.

The foregoing motion to direct the jury to render a verdict in favor of the defendant and against plaintiff is made and based upon the following grounds.

(a) That the cause of action in the Amended Complaint of the plaintiff upon which he is now relying, is expressly based upon and recovery is therein expressly sought under the provisions of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: 'Liability of Employers for Injuries to Workmen in Dangerous Occupations.' That said Act is unconstitutional and void and plaintiff is entitled to no recovery or relief thereunder for the reason that said Act imposes upon this defendant unlimited liability for injury or injuries sustained by plaintiff without fault or negligence on the part of this defendant, and said Act is contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives this defendant of its property without due process of law and denies to this defendant the equal protection of the laws."

ARGUMENT.

An inspection of these Specifications of Error will show that the first ground of demurrer to the complaint, the second ground of demurrer to the complaint, the objection to the making of any statement to the jury and

to the introduction of evidence on behalf of the plaintiff (defendant in error), and the exception to the ruling of the Court in denying the motion and request of the defendant (plaintiff in error) to instruct the jury to return a verdict in favor of the defendant (plaintiff in error), are all based upon the one objection that the so-called "Employers' Liability Law" of the State of Arizona, to-wit, Chapter 6, Title 14 of the Revised Statutes of Arizona, 1913, Civil Code, is unconstitutional and void; and the sole question at issue herein, and called to the attention of the court, is as to whether or not the provisions of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, entitled "Liability of Employers for Injuries to Workmen in Dangerous Occupations," are unconstitutional and void and contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, in that said Act is an attempt to deprive defendant (plaintiff in error) of its property without due process of law and denies to the defendant (plaintiff in error) the equal protection of the laws.

Section 7 of Article XVIII of the Constitution of the State of Arizona provides as follows:

> "To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employer's Liability Law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of

such employee shall not have been caused by the negligence of the employee killed or injured."

Chapter 6 of Title 14, Civil Code of Arizona, 1913, was enacted in obedience to the mandate contained in Section 7 of Article XVIII of the Constitution of the State of Arizona, and is as follows:

"TITLE 14.

"CHAPTER VI.

"Liability of Employers for Injuries to Workmen in Dangerous Occupations.

"3153. This chapter is and shall be declared to be an employers' liability law as prescribed in Section 7 of Article XVIII of the State Constitution:

"3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article XVIII of the State Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the

meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

"3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter as as follows:

(1) The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated.

(2) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

(3) The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel frame work.

(4) The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

(5) All work on ladders or scaffolds of any kind

elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

(6) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

(7) All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

(8) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

(9) All work in the construction and repair of tunnels, subways and viaducts.

(10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

"3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

"3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged

therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased.

"3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in Section 5 of Article XVIII of the State Constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

"3160. That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall

be to enable any employer to exempt himself or itself from any liability created by this chapter, shall to that extent be void; provided, that in any action brought against any such employer under or by virtue of any of the provisions of this chapter, such employer may set off therein any sum it has contributed or paid to any insurance, relief, benefit or indemnity or that it may have paid to the injured employee or his personal representative on account of the injury or death for which said action was brought.

"3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then, and in that event, the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

"3162. No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

EMPLOYERS' LIABILITY ACT IS COMPENSATION ACT

The meaning of this last named Act is simply stated in Paragraph 3158; and is, that when an employe is injured or killed in the course of his employment, and which injury or death shall be due to a condition or conditions

of such occupation and shall not be caused by his own negligence, then he, or in case of his death his personal representatives, shall have a cause of action for *unlimited damages* against his employer, regardless of whether or not such action is caused by the negligence of the employer.

The provision for *unlimited damages* in this Act is a provision heretofore unknown to all compensation laws, so far as we can determine.

The Federal Employers' Liability Act, while it abolishes certain common law defenses, is predicated and gives a right of action upon the fact that there must be negligence on the part of the employer; and in the sense generally used in all acts providing for unlimited liability, such liability for damages is based upon tort.

Notes under L. R. A. (1915C), p. 54, Seaboard A. L. R. Co. v. Horton.

In the Arizona Employers' Liability Law (paragraph 3158), it is provided that

"the employer of such employe shall be liable in *damages* to the employe injured."

There are two kinds of damages known to the law: compensatory damages and punitive damages. Compensatory damages are such as make the wrong to be whole as of the time of the injury, and mean compensation for the loss incurred or the injury sustained in a given case.

Myhra v. Chicago, M. & P. S. Ry., 112 Pac. 939

Punitive damages exist where the tortious act is aggravated by evil motive, malice, violence, oppression or fraud.

James McNeil & Bro. Co. v. Crucible Steel Co. of America, 56 Atl. 1067-1071.

A careful reading of the Arizona statute seems to

show that it was the intention of the Legislature to award damages of a compensatory nature, and not of a punitive nature, for the right of action is given in the entire absence of negligence, malice, fraud, etc., on the part of the employer. We can therefore rightfully assume that the Employers' Liability Act of Arizona is purely in the nature of a compensation act, with the amount of such compensation entirely unlimited.

Liability at common law is based upon tort. The departure in comparatively recent legislation of the various states by the enactment of workmen's compensation acts, from the common law principle, has been due to the necessity of providing protection for working men engaged in hazardous occupations, in case of accident arising from the conditions of such occupations, but in every such case the Legislature has regulated such liability.

This Court has held that it is within the power of the Legislature of the state to create liability on the part of employers, even though the same shall only be implied from the fact that an employe may be engaged in a hazardous occupation (N. Y. Cent. RR. Co. v. White, 243 U. S. 188).

In every other state, except the State of Arizona, where a new right of action of this character has been created, and which is strictly in derogation of the common law, the enactment in which such right of action has been given is termed a "Compensation Law," and any award provided for, to an employe injured in the course of his employment, without his fault and due to the surroundings or conditions of his occupation, has been called "compensation"; and the manner of computing such compensation and the amount to be awarded such employe has been based upon a plan which includes the taking into consideration of wages and earning capacity of such

employe, the duration of the disability occasioned by the accident, or in case of death, by a flat amount based upon the ascertaining of a fixed period of earning capacity.

In consideration of this particular question as affecting the Employers' Liability Law, it must also be recognized that the framers of the Constitution of the State of Arizona made provision for the enactment of what is termed a "Workmen's Compensation Act," in Section 8 of Article XVIII, as follows:

> "The Legislature shall enact a Workmen's Compulsory Compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any law affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

In pursuance of this Constitutional mandate, Chapter VII of Title 14 of the Revised Statutes of Arizona, Civil Code, 1913, was enacted, as follows:

"CHAPTER VII.

"Compensation for Injuries to Workmen Engaged in Dangerous and Hazardous Employment.

"3163. This Chapter is a Workman's Compulsory Compensation law as provided in Sec. 8 of Article XVIII of the State Constitution.

"3164. Compulsory compensation shall be paid by his employer to any workman engaged in any employment declared and determined as in the next section hereof (as provided in Sec. 8 of Article XVIII of the State Constitution) to be especially dangerous, whether said employer be a person, firm, association, company, or corporation, if in the course of the employment of said employee personal injury thereto from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of usch employment, or a necessary risk or danger of such employment, or a necessary risk ure of such employer, or any of his or its officers, agents, or employee or employees, to exercise due care, or to comply with any law affecting such employment.

"3165. The employments hereby declared and determined to be especially dangerous (as provided in Sec. 8 of Article XVIII of the State Constitution) within the meaning of this Chapter are as follows:

(1.) The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by a steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over, and by which such railway business is operated.

(2.) All work when making, using or necessi-

tating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

(3.) The erection or demolition of any bridge, building, or structure in which there is, or in which the plans and specifications require, iron or steel framework.

(4.) The operation of all elevators, elevating machinery or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

(5.) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

(6.) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

(7.) All work in the construction, alteration or repair of pole lines for telegram, telephone or other purposes.

(8.) All work in mines; and all work in quarries.

(9.) All work in the construction and repair of tunnels, subways and viaducts.

(10.) All work in mills, shops, works, yards, plants, and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

"3166. In case such employee or his personal representative shall refuse to settle for such com-

pensation (as provided in Sec. 8 of Article XVIII of the State Constitution) and chooses to retain the right to sue said employer (as provided in any law provided for in Sec. 7, Article XVIII of the State Constitution) he may so refuse to settle and may retain said right.

"3167. It is hereby declared and determined to be contrary to public policy that any employer conducting any especially dangerous industry, through any of his or its officers, agents, or employee or employees, shall fail to exercise due care, or fail to comply with any law affecting such employment, in such manner as to endanger the lives and safety of employees thereof, without assuming the burden of the financial loss through disability entailed upon such employees, or their dependents, through such failure; and it is further declared and determined to be contrary to public policy that the burden of the financial loss to employees in such dangerous employments, or to their dependents, due to injuries to such employees received through such accidents as are hereinbefore mentioned shall be borne by said employees without due compensation paid to said employees, or their dependents, by the employer conducting such employment, owing to the inability of said employees to secure employment in said employments under free contract as to the conditions under which they will work.

"3168. The common law doctrine of no liability without fault is hereby declared and determined to be abrogated in Arizona as far as it shall be sought to be applied to the accidents hereinbefore mentioned.

"3169. When, in the course of work in any of

the employments described in the third section above, personal injury by accident arising out of and in the course of such labor, service, or employment, is caused to or suffered by any workman engaged therein, by any risk or failure specified in Section 66 (Par. 3164) hereof, then such employer shall be liable to and must make and pay compensation to the workman injured, and his personal representative, when death ensues, for the benefit of the estate of the deceased, for such injury at the rates and in the manner hereinafter set out in this Chapter;

Provided, that the employer shall not be liable under this Chapter in respect of any injury which does not disable the workman for a period of at least two weeks after the date of the accident from earning full wages at the work at which he was employed, at the time of the injury; and provided, further, that the employer shall not be liable under this Chapter in case the employee refuses to settle for such compensation and retains his right to sue as provided in Section 68 (Par. 3166) of this Title.

"3170. When an injury is received by a workman engaged in any labor or service specified in Section 67 (Par. 3165) of this Title, and for which the employer is made liable as specified in Section 71 (Par. 3169) hereof, then the measure and amount of compensation to be made by the employer to such workman or his personal representative for such injuries, shall be as follows:

(1.) If the injury by accident does not result in death within six months from the date of the accident, but does produce or result in total incapacity of the workman for work at any gainful employment for more than two weks after the accident, then the

compensation to be made to such workman by his employer shall be a semi-monthly payment commencing from the date of the accident and continuing during such total incapacity, of a sum equal to fifty per centum of the workman's average semi-monthly earnings when at work on full time during the preceding year, if he shall have been in the employment of such employer for such length of time; but if not for a full year, then fifty per centum of the average wages, whether semi-monthly, weekly, or daily, being earned by such workman during the time he was at work for his employer before and at the time of the accident.

(2) In case (1) the accident does not wholly incapacitate the workman from the same or other gainful employment; or (2) in case the workman, being at first wholly incapacitated, thereafter recovers so as to be able to engage at labor in the same or other gainful employment, thereby earning wages, then in each case the amount of the semi-monthly payment shall be one-half of the difference between the average earnings of the workman at the time of the accident determined as above provided, and the average amount he is earning, or is capable of earning, thereafter, semi-monthly in the same or other employment—it being the intent and purpose of this Chapter, that the semi-monthly payments shall not exceed, but equal, from time to time, one-half the difference between the amount of average earnings ascertained as aforesaid at the time of the accident, and the average amount which the workman is earning, or is capable of earning, in the same or other employment or otherwise, after the accident and at the time of such semi-monthly pay-

ment. Such payments shall cease upon the workman recovering and earning, or being capable of earning, in the same or other gainful employment or otherwise, wages equal to the amount being earned at the time of the accident;

Provided, however that the payments shall continue to be made as herein determined to the workman so long as incapacity to earn wages in the same or other employment continues, but in no case shall the total amount of such payments as provided in sub-sections 1 and 2 of this section exceed four thousand dollars.

(3.) When the death of the workman results from the accident within six months thereafter, and the workman, at the time of his death, leaves a widow, and a minor child or children, dependent on such workman's earnings for support and education, then the employer shall pay to the personal representative of the deceased workman for the exclusive benefit of such widow and child, or children, a sum equal to twenty-four hundred times one-half the daily wages or earnings of the decedent, determined as aforesaid, but in no event more than the sum of four thousand dollars. Such sum shall be paid in lump and held in trust by such representative for such widow and children and applied by him to the support of the widow while she remains unmarried, and to the support and education of the children so long as necessary, and until eighteen years of age, in such way and manner as to him shall seem best and just, under and in accordance with the directions of the court having jurisdiction of the estate of the decedent; any balance remaining unapplied at the closing of the estate of the decedent shall be dis-

tributed to the decedent's widow (if still his widow), and the children or next of kin, as provided by the law of descents. The personal representative may pay out of said fund the reasonable and necessary expenses of medical attendance and burial of the decedent. If the workman leaves no widow or child, or children, but a father or mother or sister dependent on him for support, then said sum shall be for their benefit to be applied as above provided. If the deceased workman leaves no widow, children, or other dependents, then the employer shall pay the reasonable expenses of medical attendance upon the decedent and also provide and secure his burial in a proper cemetery, which may be chosen by the friends of the decedent.

"3171. Any workman claiming compensation under the provisions of this Chapter shall, if requested by the employer, or upon written notice by him given to the employer, submit himself for bodily examination by some competent licensed medical practitioner or surgeon of the county in which the workman then resides, to ascertain and determine the nature, character, extent, and effect of the injury to such workman at the time of such examination for the purpose of ascertaining the semi-monthly compensation then and thereafter to be made. The employer or the workman not having requested the examination may have present at the examination a medical representative by him chosen. Each party shall pay his chosen representative the expenses of such examination. The said notice shall be given at least ten days before the date fixed for the examination, and the place shall be convenient for the workman to be examined. In case the employer is a cor-

poration, the notice may be served on any officer or agent thereof in the said county, and if none there, then elsewhere in the state. The examiner shall make a verified report in writing in duplicate within ten days after the examination and furnish one copy to the employer and one to the workman. If any workman neglects or refuses to submit to an examination, his right to compensation, if any, shall be suspended until he notifies the employer in writing of his readiness to submit thereto. No persons other than the physicians and surgeons aforesaid shall attend any examination except by agreement of the parties. If the employer and the workman each have an examiner, and they shall agree upon and join in a report, the same shall be conclusive so long as it remains in force. If either the employer or the employee, having opportunity, fails to provide an examiner, then the report of the examiner making such examination shall likewise be conclusive so long as the same remains in force. If the workman and the employer each have an examiner present, and they disagree as to the nature, character, extent, or effect of the injury, and the degree of incapacity, if any, for labor on the part of the workman at the time of such examination, then they shall join in a written report stating the matters in which they agree, and in which they disagree, and mutually select some disinterested medical practitioner or surgeon of the county to whom the same shall be referred, and who shall proceed promptly to make an examination of the workman as to the matters in disagreement, and the same shall be conclusive so long as such report remains in force, which report shall be made by such disinterested ex-

aminer and verified, and a copy thereof furnished to the employer and the workman. For making such examination, such examiner shall be entitled to a fee of ten dollars, to be paid one-half by the employer and one-half by the workman at the time of such examination. Such examination may be required by the workman or the employer at periods not shorter than three months from the date of the last examination. The report of any examination shall supersede all previous reports. When there is disagreement between the examiners aforesaid, and they cannot agree upon a third person as above provided, then it shall be the duty of the chairman of the board of supervisors of the coutny, on written notice of either the workman or employer, to appoint some licensed medical practitioner or surgeon, who shall be a resident of the county, to make such examination, and said appointee shall be entitled to the same compensation.

"3172. Every workman seeking compensation under the provisions of this chapter, where the same is not fatal or does not render him incompetent to give the notice, shall, within two weeks after the day of the accident, give notice in writing to the employer, or his representative employing such workman, or to the foreman or other employee of the employer under whom he was working at the time of the accident, and before the workman has voluntarily left the service of the employer and during his disability. The notice shall state (1) the name and address of such workman, (2) the date and place of the accident, (3) and state in simple words the cause thereof, (4) the nature and degree of the injury sustained, (5) and that compensation is claim-

ed under this Chapter. The notice may be written and served personally by the workman or by any one in his behalf on any person named above in this section, or by mail, postpaid, to such person, addressed to the office, place of business or residence of the person notified. No want or defect or inaccuracy of the notice shall be a bar to the right of the workman to claim and receive compensation under this chapter, or to maintain any proceeding to secure the same, unless the employer proves that he has been seriously prejudiced by such lack of notice. No compensation shall be claimed or allowed so long as such notice is not given. If the workman is killed, or otherwise rendered incompetent to give the notice, the same is not hereby required, nor is any notice required to be given by the personal representative of such deceased person. It shall be the duty of any one giving a notice as in this section provided, to mail a duplicate copy to the attorney general of this state.

"3173. Any question which may arise between the employer and the workman or his personal representative, under this chapter, shall be determined either (1) by written agreement between the parties, or (2) by arbitration, or (3) by reference and submission to the attorney general of this state; and in case of a refusal or failure of the employer and workman, or such personal representative, to agree upon a settlement by either of the modes above provided, then by a civil action at law, showing such refusal or failure as a reason for suit. If any employer fails to make and pay compensation, as in this chapter provided, for a period of three months after the date of the accident, or for any two months

or more after payment of the last monthly compensation, then the injured workman, if surviving, or the personal representative, in case of death, may bring an action in any court of competent jurisdiction to recover and enforce the compensation herein provided. Such action shall be conducted as near as may be in the same manner as other civil actions at law. The action shall be brought within one year after the happening of the accident, or after the non-payment of any semi-monthly installment theretofore fixed by agreement or otherwise; or within one year after the appointment of a personal representative of the decedent. The judgment in such action, when in favor of the plaintiff, shall be for a sum equal to the amount of payments then due and prospectively due under the provisions of this chapter. The judgment shall be for the total amount thereof and collectible without relief from valuation or appraisement laws. And the court awarding the judgment shall, by proper order, direct that the same shall be paid ratably to the workman, if living, in semi-monthly installments until the determination of the periods provided in this chapter the same as if such payments were being made voluntarily or without suit in conformity with this chapter. The judgment, by agreement, if it appears to the court to be for the best interests of the workman, may be paid in lump and not otherwise. The court rendering the judgment is hereby given power from time to time to make such orders touching the matter of payments as may appear best to provide for the maintenance and support of the workman and his family during his infirmity, and for his and their benefit and security. The employer shall have the

right to stay the judgment in whole, whether the same is to be paid in lump sum or monthly installments, upon securing the same by one or more freehold sureties or a surety company, to be approved by the court rendering the judgment, who shall enter into a recognizance acknowledging themselves bound for the defendant for the payment of the judgment in lump or in partial payments as the same is, or shall be made, payable, together with interest and costs. On failure of any one or more of such payments by the employer, execution may issue out of said court and cause, against such defendant, and his bail from time to time, leviable and collectible without relief from valuation or appraisement or stay laws. The recognizance shall be written upon the order book of the court and immediately following the entry of the judgment and signed by such bail and docketed in the judgment docket of the court against such defendant and bailors, which shall bind the property of the same in the same manner as the judgment binds the property of the employer. In an action by a personal representative of a deceased workman, the court shall determine the proportions of the judgment, whether in lump or in installments, to be distributed between the widow and child, or children, with power to alter and amend the apportionment from time to time on petition of any party interested as the court may deem best for the support, maintenance, and education of such widow and cihldren.

In any action under this chapter the court shall fix and allow, at the time of entering the judgment against the employer, a reasonable fee to the workman's attorney, to be taxed against the employer as

costs, and collectible in the same manner. From such allowance there shall be no right of appeal. Such attorney shall have no claim for compensation upon the judgment or its proceeds, other than as herein provided. But no allowance, or any fee payable by the workman to an attorney for services, or any fee payable by the workman to an attorney for services in securing a recovery or disbursement, shall ever exceed twenty-five per centum of the principal of the sum recovered; and the same shall not be made a lien on the recovery or its proceeds, except as may be determined and allowed and fixed by the court.

"3174. Any workman entitled to monthly or other payments from or to any judgment against any employer as above provided, as compensation, shall have the same preferential claim therefor against the property and assets of the employer and any bailor as now is allowed by law for unpaid wages for personal services. No judgment or any part thereof, nor monthly payments due, or coming due, under this chapter shall be assignable by the workman or subject to mortgage, levy, execution, or attachment. But the same shall stand as a continuing provision for the maintenance and support of such injured workman during his incapacity for the periods provided in this chapter.

"3175. In case an injured workman, having a right of action under the provisions of this chapter, shall be mentally incompetent at the time when any right or privilege accrues thereunder to him, a guardian may be appointed by any court having jurisdiction, to secure and protect the rights of such workman; and the guardian may claim and exer-

cise any and all of such rights or privileges with the same force and effect as if the workman himself had been competent and had claimed or exercised any such right or privilege; and no limitation of time provided in any of the foregoing sections shall run so long as said incompetent workman has no guardian.

"3176. This chapter shall be construed as a continuation of the law contained in Chapter XIV of the laws of the First Legislature of the State of Arizona, Second Session. All workmen employed by an employer at manual and mechanical labor of the kinds defined in Section 67 (Par. 3165) of this chapter shall be deemed and held in law to be employed and working subject to the provisions of this chapter, and the employer and the workman shall alike be bound by and shall have each and every benefit and right given in this chapter the same as if a mutual contract to that effect were entered into between the employer and the workman at any time before the happening of any accident. It shall be lawful, however, for the employer and workman to disaffirm an employment under the provisions of this chapter by written contract between them or by written notice by one to and served upon the other to that effect before the day of the accident;

Provided, such written contract does not provide for less compensation than as provided in this chapter. And in the absence of such written contract or written notice, served as above provided, it shall be taken and held that the employment and service is under this chapter; and the same shall be the sole measure of their respective rights and liabilities when and as provided in this chapter;

Provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this chapter or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the State Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.

"3177. Any employer employing workmen to perform labor or services of other kinds than as defined in this chapter, and such workmen and employees may, by agreement, at any time during the employment, accept and adopt the provisions of this chapter as to liability for accident, compensation, and the methods and means of paying and securing and enforcing the same. And in every such case the provisions of this chapter shall be taken in law and fact to bind the parties as fully as if they were specifically mentioned and embraced in the provisions of this chapter.

"3178. This chapter is remedial in its purpose and shall be construed and applied so as to secure promptly and without burdensome expense to the workman the compensation herein provided and apportioned so as to provide support during the periods named for the loss of ability to earn full wages.

"3179. Nothing in this chapter shall be deemed or taken to repeal or affect in any way any other acts or laws passed by the first legislature of the State of Arizona, and in so far as refers to the same

subject in other acts it shall be deemed to be cumulative only."

Under this Act, the employer is liable to his employe whenever injury results from any accident arising out of or in the course of such employment, when such injury "is caused in whole or in part or is contributed to by a necessary risk or danger of such employment or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, employe or employes, to exercise due care or to comply with any law affecting such employment."

In other words, the only distinction between the Employers' Liability Law and the Workmen's Compensation Act is that, in the former, the employe cannot recover if the accident is caused by his own negligence: whereas, in the latter, he can recover if the accident is *contributed to* by a necessary risk or danger of such employment.

In analyzing the reason for liability in both of these Acts, we cannot discern any difference. Certainly, if an accident is caused by an employe's own negligence, it cannot be contributed to by the employer; and if it is caused by his own negligence, it cannot be due to any risk of the employment itself. Yet, in the Compensation Act, the liability is limited; and in the Employers' Liability Act, the liability is unlimited. So that the Legislature, in the enactment of the Compensation Act, has provided a system whereby such liability can be ascertained, and has provided bounds beyond which the amount of such liability cannot go; and then paradoxically has enacted the Employers' Liability Law, which disregards such limited remedy and plan for compensa-

tion, and renders the employer liable for an unlimited amount.

Thus, under the Compensation Act, the employe was given full protection and right under the statute enacted in pursuance of the Constitutional mandate, which was strictly in derogation of the common law, and the employer was given the protection of limited liability; and then, disregarding the principle established by the Compensation Act, the Legislature enacted the Employers' Liability Law, thus preserving every right of the employe, and destroying the protection afforded the employer (under the Workmen's Compensation Act) by subjecting such employer to unlimited liability.

If the new right of action, given under the provisions of the Employers' Liability Law, arises when there occurs an accidental injury, in which neither the employe nor the employer may be to blame, the liability should be measured and ascertained according to rules adopted by approved Compensation Acts; otherwise such liability cannot conform to due process of law, or such liability act cannot afford due protection of the laws.

N. Y. Central RR. Co. v. White, 243 U. S. 188, *supra.*

The Supreme Court of the State of Arizona has defined what avenues of redress are open to employes injured, or in case of death to their personal representatives, where such employes are injured or killed in the course of employment in a hazardous occupation; and has specifically set forth the three methods of redress, to-wit:

1.—To recover under the Workmen's Compensation Act;

2.—To recover under the Employers' Liability Law;

3.—To maintain an action at common law for damages.

And the court has further held that the employe, having once elected to pursue one of the three methods above described, must pursue exclusively the remedy under such election.

Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 Pac. 465.

Section 4 of Article 18 of the Constitution of the State of Arizona provides as follows:

> "The common law doctrine of fellow servant, so far as it affects the liability of the master for injuries to his servants resulting from the acts or omissions of any other servant or servants of the common master, is forever abrogated."

Section 5 of the same Article provides as follows:

> "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

In any event, the employer, or the master, is denied the defense of the negligence of a fellow servant, and is practically denied any defense as to contributory negligence or assumption of risk; and is denied these defenses whether or not the employe sues under the provisions of the Workmen's Compensation Act or under the Employers' Liability Law.

The theory of upholding compensation acts of the various states has been based upon the idea that they are substitutes, enacted by the Legislature in place of the common law employers' liability rule of damages for personal injury, in that the state owes the duty to its members of preventing their becoming public charges by reason of injuries sustained in the industries of mod-

ern civilization; and it is incumbent upon the state, as a duty, to stop the waste of time in protracted and bitterly contested law suits, and thereby remove one of the most potent causes of hatred and animosity between the employer and the employe; and that the state also has the obligation and duty to prevent unjust and bogus claims, supported and opposed by perjury and subornation of perjury, and to see that bona fide claims for injuries actually sustained in the course of the various employments, for compensation, are amicably and expeditiously settled, and that the injured employe, or his dependents in case of his death, receive not only a portion of the amount which may be rightfully due him under prescribed rules, but that all of such money shall be so received, and that none shall be dissipated in useless and unnecessary legal expenses.

Our Employers' Liability Law, being a special statute in derogation of the common law, cannot be construed in any way but in the light of a compensation act, and it must be judged and determined in accordance with such rules of law as must apply to compensation acts. It must be measured to the extent and degree that it does away with the evils attendant upon the system of litigation, which has grown up under the principles of the common law, and measured by the extent and to the degree that it has substituted for such system proper and advantageous methods and rules with respect to ascertaining the amount due the injured employe, or his dependents in case of his death; keeping in mind always that when the protection of the law is afforded an employe under the provisions of such Compensation Act, the same protection must be afforded the employer, to the extent of limiting, according to prescribed rules, the liability to which he shall be subjected.

The Employers' Liability Law of the State of Arizona is not a substitute for former rights and remedies. It creates a new right, not to take the place of old ones, but supplemental or cumulative in its nature. It leaves open to the injured employe the common law action of negligence, as modified by our Constitution, and also the right to claim under the Compensation Act.

In the case of New York C. R. vs. White, 243 U. S. 188, *supra*, this Court considered the New York Workmen's Compensation Act, and specifically held in that case that it was a substituted system, devised to compensate employes or their dependents for injuries received in certain hazardous occupations, the measure of damages being based upon the loss of earning power, having regard to the previous wage and the character and duration of disability, and in case of death, benefits according to the dependency of the surviving wife, husband, etc. In that case, at page 201, it states:

> "It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the Constitutional guaranty of due process of law,' suddenly set aside all common law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the State of New York, for instance, with hundreds of thousands of plants and millions of wage-earners, each employer on the one hand having embarked his capital, and each employee on the other having taken up his particular mode of earning a

livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it.

"The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question at fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The Act evidently is intended as a just settlement of a difficult problem, affecting one of the most important

of social relations, and it is to be judged in its entirety."

Further on in the discussion of said case, it is stated:

"It is plain that, on grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable from the standpoints of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale. * * * *

"In excluding the question of fault as a cause of injury, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadven-

turers, with personal injury to the employee as a probable and foreseen result. * * *

"Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or, in case of his death, those who were entitled to look to him for support, in lieu of the common law liability confined to cases of negligence.

"This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises."

The Employers' Liability Law of Arizona does not relieve "the employer from responsibility for damages, measured by common law standards." It does not "require him to contribute a reasonable amount, according to a reasonable and definite scale, by way of compensation for loss of earning power." It is not a substituted system, assuring the employe "a definite and easily ascertained compensation," and the employee is not required to assume "any loss beyond the prescribed scale."

Our Employers' Liability Law violates the recognized power of "the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee * * * *in lieu of the common law liability confined to cases of negligence," by permitting a recovery of an

unlimited amount, not for disability alone, as in the White case, but for physical suffering also. It is not a composition of losses sustained in a mutual joint adventure (as Justice Pitney reasons), in which accidental injury is inevitable and is expected, but it places all of the loss, without limitation, upon one of the "co-adventurers," to-wit, the employer.

The Employers' Liability Law not only practically deprives the employer of all of the defenses known to the common law, but takes from him the right to defend by showing that he was guilty of no fault. In other words, the legislation is all in favor of the employe, and the employer is given no chance to escape the unlimited liability imposed. When action is commenced under this Act, the employer has no alternative. He cannot relegate the employe to any other act or mode of procedure, except the one which the employe himself has selected. And when damages have been imposed in pursuance of the provisions of this law, under the conditions as fully stated herein, the employer is deprived of his property without due process of law, and is deprived of the equal protection of the law.

Respectfully submitted,

ALEX BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for Plaintiff
in Error.